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August 2, 1994

William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

Re: Written Ex Parte Presentation - PP Docket No. 93-253

Dear Mr. Caton:

Cook Inlet Region, Inc. ("CIRI") hereby gives notice of a written ex parte presentation in the above-referenced proceeding. The presentation was made in the form of the attached memorandum to Peter A. Tenhula of the Office of General Counsel.

Two copies of the memorandum are submitted herewith pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(1) (1993).

Sincerely,

Mark F. Dever

enclosures

SUMMARY OF POINTS AND AUTHORITIES

(1) There is absolutely no Constitutional (i.e., Equal Protection) issue in adopting the SBA Tribal Affiliation Rule.

- Under the Indian Commerce Clause, the federal government has express, plenary authority regarding Indian tribes. See U.S. Const., Art. 1, § 8.

- It is established beyond question that the federal government may establish a policy singling out Indian tribes for special beneficial treatment and that such treatment is not a matter of racial discrimination but of political relationships with quasi-sovereign entities. As the unanimous Supreme Court stated in United States v. Antelope, 430 U.S. 641, 645 (1977):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial qualifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.
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> * * *
>
> Legislation with respect to these "unique aggregations" has repeatedly been sustained by this Court against claims of unlawful discrimination. In upholding a limited employment preference for Indians in the Bureau of Indian Affairs, we [unanimously] said in Morton v. Mancari, 417 U.S. 535, 552 (1974):
>
> * * *
>
> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."

United States v. Antelope, supra, and Morton v. Mancari, supra, remain the authoritative cases on this issue. See, e.g., Duro v. Reina, 495 U.S. 676, 692 (1990) (upholding federal government's right to impose "burdens and benefits" on Indian tribes as an exclusive class), citing United States v. Antelope, supra,; Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163, (1989) (reaffirming plenary federal power to regulate regarding Indian tribes), citing Morton v. Mancari, supra.

- Accordingly, of all the possible constitutional issues surrounding racial and gender distinctions adopted by the Commission, none can be farther from doubt than the question of adopting the SBA tribal affiliation rule. There is no question that it is fully permissible under the Constitution.

(2) The Commission has a direct fiduciary duty to Indian tribes to implement Congressional policy.

- The leading treatise in this area, F. Cohen, Handbook of Federal Indian Law, 225 (1982), summarizes this obligation as follows:

> "[T]he Federal trust responsibility [toward Indians] imposes strict fiduciary standards on the conduct of executive agencies -- unless Congress has expressly authorized a deviation from these standards in exercise of its "plenary" power. Since the trust obligations are binding on the United States, these standards of conduct would seem to govern all executive departments that may deal with Indians, not just those such as the Bureau of Indian Affairs with have special statutory responsibilities for Indian Affairs."

- Based upon the above, part of the "public interest" to be served by the Commission involves recognition and fulfillment of this fiduciary duty toward Indian tribes. See, e.g., LaRose v FCC, 494, F.D. 1145-46, 1146 n. 2 (D.C. Cir. 1974) (discussed below); Greater Boston Television Corp. v. FCC, 444 F. 2d 841 (1970), cert. denied, 403 U.S. 924 (1971).

- We believe this fiduciary obligation involves a trust responsibility by the Commission to recognize Indian tribes as "unique aggregations", see United States v. Antelope, supra, at 645, and to act expeditiously to correct administrative errors. We believe this obligation supports issuance of a sua sponte order adopting the SBA tribal affiliation rule.

(3) The Commission's mandate to regulate in the public interest, plus principles of comity, require that the Commission adopt the SBA treatment of Indian tribes.

- The leading case on this area is LaRose v. FCC, 494 F. 2d 1145, (D.C. Cir. 1974) (finding abuse of discretion in FCC refusal to follow policies of other federal agencies outside FCC area of expertise).

- In adopting the SBA program but deleting the SBA and Congressional rule on tribal affiliation, the Commission has left ample ground for a court to find an abuse of discretion and impose injunctive relief regarding the PCN process.

- The above conclusions stand on their own merits but are also bolstered by the following facts: (1) the total lack of support in the FCC record for deletion of the SBA tribal affiliation rule (169 Reply Comments filed, with no objection), and (2) the FCC's strikingly inconsistent policy regarding "small business consortiums." See letter from Roy Huhndorf to FCC Chairman Reed Hundt, dated July 27, 1994.

430 U.S. 641, 51 L.Ed.2d 701

UNITED STATES, Petitioner,

v.

Gabriel Francis ANTELOPE et al.

No. 75-661.

Argued Jan. 18, 1977.

Decided April 19, 1977.

Two enrolled Coeur d'Alene Indians were convicted in the United States District Court for the District of Idaho for first-degree murder under the felony-murder provisions of the federal enclave murder statute, made applicable to the Indians by the Major Crimes Act, and were also convicted of burglary and robbery, while third Indian was convicted of second-degree murder, and they appealed. The United States Court of Appeals for the Ninth Circuit, 523 F.2d 400, reversed the murder convictions, and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that federal legislation with respect to Indian tribes, though relating to Indians as such, is not based on impermissible racial classifications; and that prosecution of defendants under federal felony-murder statute for murder of a non-Indian within Indian country, subject to the same body of laws as any other individual charged with first-degree murder committed in a federal enclave, did not deny them due process or equal protection despite fact that a non-Indian charged with the same crime would have been tried under Idaho law which lacks a felony-murder provision, so that the prosecution would have been required to prove premeditation and deliberation.

Judgment of Court of Appeals reversed and case remanded.

1. Indians ⇐32, 38(2)

Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts, but a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law. 18 U.S.C.A. §§ 1152, 1153.

2. Indians ⇐2

Federal legislation with respect to Indian tribes, though relating to Indians as such, is not based on impermissible racial classification but is instead rooted in the unique status of Indians as "a separate people" with their own political institutions, and amounts to governance of once-sovereign communities, rather than legislation of a "racial" group consisting of Indians. U.S.C.A.Const. art. 1, § 8, cl. 3.

3. Indians ⇐38(2)

Members of Indian tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act, and crimes by enrolled tribal members occurring elsewhere than within the confines of Indian country are not subject to exclusive federal jurisdiction. 18 U.S.C.A. § 1153.

4. Constitutional Law ⇐250.2(1), 257

Enrolled members of the Coeur d'Alene Indian Tribe who were prosecuted under the Major Crimes Act for felony-murder of a non-Indian within the boundaries of the Indian reservation and who were subject to the same body of laws as any other individual charged with first-degree murder committed within a federal enclave were not denied due process or equal protection on ground that, if they had not been Indians, they would have been prosecuted under Idaho law which, unlike federal law, lacked felony-murder provision so that the prosecution would have been required to prove premeditation and deliberation. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. §§ 1111, 1153, 3242; I.C. § 18-4003.

5. Indians ⇐36

Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country.

6. Constitutional Law ⇐250.1(1)

It is of no consequence for equal protection purposes that federal scheme of criminal law applicable in federal enclaves differs from a state criminal code otherwise applicable within the boundaries of the state; the national Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of states with respect to the same subject matter. U.S.C.A.Const. Amend. 5.

7. States ⇐4.8

Rule that federal prosecution arising from federal enclave would have to be governed by state law to the extent that state law was more "lenient" than federal would be inconsistent with the supremacy clause. U.S.C.A.Const. art. 6, cl. 2.

Syllabus *

Respondents, enrolled Coeur d'Alene Indians, were indicted by a federal grand jury on charges of burglary, robbery, and murder of a non-Indian within the boundaries of their reservation. One respondent was convicted of second-degree murder only; the other two were convicted of all three crimes as charged, including first-degree murder under the felony-murder provisions of the federal-enclave murder statute, 18 U.S.C. § 1111, as made applicable to Indians by the Major Crimes Act, 18 U.S.C. § 1153. The Court of Appeals reversed on the ground that respondents had been denied their constitutional rights under the equal protection component of the Fifth Amendment's Due Process Clause. The court agreed with respondents' contention that their felony-murder convictions were racially discriminatory since a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, under which premeditation and deliberation would have had to be proved, whereas no such elements were required under the felony-murder provisions of 18 U.S.C. § 1111. *Held*: Respondent Indians were not deprived of the equal protection of the laws. Pp. 1398–1401.

(a) The federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications. Federal regulation of Indian tribes is rooted in the unique status of Indians as "a separate people" with their own political institutions, and is not to be viewed as legislation of a " 'racial' group consisting of 'Indians'. . . ." *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, 41 L.Ed.2d 290. Pp. 1398–1399.

(b) The challenged statutes do not otherwise violate equal protection. Respondents were subjected to the same body of law as any other individuals, Indian or non-Indian, charged with first-degree murder committed in a federal enclave. Congress has undoubted power to prescribe a criminal code applicable to Indian country, and the disparity between federal law and Idaho law has no equal protection or other constitutional significance. Pp. 1399–1400.

523 F.2d 400, reversed and remanded.

1642 Andrew L. Frey, Washington, D. C., for petitioner.

John W. Walker, Moscow, Idaho, for respondents Leonard and William Davison.

Allen V. Bowles, Moscow, Idaho, for respondent Gabriel Antelope.

Mr. Chief Justice BURGER delivered the opinion of the Court.

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

(1)

[1] On the night of February 18, 1974, respondents, enrolled Coeur d'Alene Indians, broke into the home of Emma Johnson, an 81-year-old non-Indian, in Worley, Idaho; they robbed and killed Mrs. Johnson. Because the crimes were committed by enrolled Indians within the boundaries of the Coeur d'Alene Indian Reservation, respondents were subject to federal jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153.[1] They were, accordingly, indicted
1643 by a federal grand jury on charges of burglary, robbery, and murder.[2] Respondent William Davison was convicted of second-degree murder only. Respondents Gabriel Francis Antelope and Leonard Davison were found guilty of all three crimes as charged, including first-degree murder under the felony-murder provisions of 18 U.S.C. § 1111,[3] as made applicable to enrolled Indians by 18 U.S.C. § 1153.

(2)

In the United States Court of Appeals for the Ninth Circuit, respondents contended that their felony-murder convictions were 1644 unlawful as products of invidious racial discrimination. They argued that a non-Indian charged with precisely the same offense, namely the murder of another non-Indian within Indian country,[4] would have been subject to prosecution only under Idaho law, which in contrast to the federal murder statute, 18 U.S.C. § 1111, does not contain a felony-murder provision.[5] To estab-

1. Title 18 U.S.C. § 1153 at the time in question provided in pertinent part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing
1642 any of the above offenses, within the exclusive jurisdiction of the United States."

The background leading up to enactment of the Major Crimes Act is discussed in *Keeble v. United States*, 412 U.S. 205, 209–212, 93 S.Ct. 1993, 1996–1998, 36 L.Ed.2d 844 (1973). As noted in that case, the Government has characterized the Major Crimes Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." *Id.*, at 209, 93 S.Ct., at 1996.

2. Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts. 18 U.S.C. § 1152. Not all crimes committed within Indian country are subject to federal or tribal jurisdiction, however. Under *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882), a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law.

3. Title 18 U.S.C. § 1111 is the federal murder statute. It provides in pertinent part:

"(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

"Any other murder is murder in the second degree."

It should be emphasized that respondent William Davison was convicted only of second-degree murder, not felony murder, under 18 U.S.C. § 1111.

4. See n. 2, *supra*. Federal law ostensibly extends federal jurisdiction to all crimes occurring in Indian country, except offenses subject to tribal jurisdiction. 18 U.S.C. § 1152. However, under *United States v. McBratney*, *supra*, and cases that followed, this Court construed § 1152 and its predecessors as not applying to crimes by non-Indians against other non-Indians. Thus, respondents correctly argued that, had the perpetrators of the crimes been non-Indians, the courts of Idaho would have had jurisdiction over these charges.

5. Idaho statutes contain the following definition of first-degree murder:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of

lish the crime of first-degree murder in state court, therefore, Idaho would have had to prove premeditation and deliberation. No such elements were required under the felony-murder component of 18 U.S.C. § 1111.

Because of the difference between Idaho and federal law, the Court of Appeals concluded that respondents were "put at a serious racially-based disadvantage," 523 F.2d 400, 406 (1975), since the Federal Government was not required to establish premeditation and deliberation in respondents' federal prosecution. This disparity, so the Court of Appeals concluded, violated equal protection requirements implicit in the Due Process Clause of the Fifth Amendment. We granted the United States' petition for certiorari, 424 U.S. 907, 96 S.Ct. 1100, 47 L.Ed.2d 311 (1976), and we reverse.

1645 1(3)

[2] The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution[6] and supported by the ensuing history of the Federal Government's relations with Indians.

> "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

Legislation with respect to these "unique aggregations" has repeatedly been sustained by this Court against claims of unlawful racial discrimination. In upholding a limited employment preference for Indians in the Bureau of Indian Affairs, we said in *Morton v. Mancari*, 417 U.S. 535, 552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974):

> "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . . ."

In light of that result, the Court unanimously concluded in *Mancari*:

> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Id.*, at 554, 94 S.Ct., at 2484.

1646 Last Term, in *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976), we held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts in connection with an adoption proceeding arising on their reservation. Unlike *Mancari*, the Indian plaintiffs in *Fisher* were being denied a benefit or privilege available to non-Indians; nevertheless, a unanimous Court dismissed the claim of racial discrimination:

> "[W]e reject the argument that denying [the Indian plaintiffs] access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." 424 U.S., at 390, 96 S.Ct., at 948.

[3] Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government,

duty, . . . shall be murder in the first degree. . . . All other kinds of murder are of the second degree." Idaho Code § 18–4003 (Supp.1976).

6. Article I, § 8, of the Constitution gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

[5, 6] There remains, then, only the disparity between federal and Idaho law as the basis for respondents' equal protection claim.[10] Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886), it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable
1649 within the boundaries of the State of Idaho. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded,[11] regardless of the laws of States with respect to the same subject matter.[12]

[7] The Federal Government treated respondents in the same manner as all other persons within federal jurisdiction, pursuant to a regulatory scheme that did not erect impermissible racial classifications; 1650 hence, no violation of the Due Process Clause infected respondents' convictions.[13]

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

against non-Indians. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882); see *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 50 S.Ct. 455, 456, 74 L.Ed. 1091 (1930); *Williams v. Lee*, 358 U.S. 217, 219–220, 79 S.Ct. 269, 270–271, 3 L.Ed.2d 251 (1959); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171, 93 S.Ct. 1257, 1262–1263, 36 L.Ed.2d 129 (1973). Federal statutes do not single out Indians as such; non-Indian defendants are also covered if the victim was a member of the tribe.

10. Respondents base their equal protection claim on the assumption that they have been disadvantaged by being prosecuted under federal law. In their view, their murder convictions were made more likely by the fact that federal prosecutors were not required to prove premeditation. However, they do not seriously question that the evidence adduced at their federal trial might well have supported a finding of premeditation and deliberation, since respondents were found to have beaten and kicked Mrs. Johnson to death during the course of a planned robbery.

11. It should be noted, however, that this Court has consistently upheld federal regulations aimed *solely* at tribal Indians, as opposed to *all* persons subject to federal jurisdiction. See, *e. g., United States v. Holliday*, 70 U.S. 407, 417–418, 3 Wall. 407, 417–418, 18 L.Ed. 182 (1866); *Perrin v. United States*, 232 U.S. 478, 482, 34 S.Ct. 387, 389, 58 L.Ed. 691 (1914). See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, at 613–615, n. 47, 97 S.Ct. 1361, 1376, 51 L.Ed.2d 660. Indeed, the Constitution itself provides support for legislation directed specifically at the Indian tribes. See n. 6, *supra*. As the Court noted in *Morton v. Mancari*, the Constitution therefore "singles Indians out as a proper subject for separate legislation." 417 U.S., at 552, 94 S.Ct., at 2483.

In this regard, we are not concerned with instances in which Indians tried in federal court are subjected to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense. Compare *United States v. Big Crow*, 523 F.2d 955 (C.A.8 1975), cert. denied, 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed.2d 327 (1976), and *United States v. Cleveland*, 503 F.2d 1067 (C.A.9 1974), with *United States v. Analla*, 490 F.2d 1204 (C.A.10), vacated and remanded, 419 U.S. 813, 95 S.Ct. 28, 42 L.Ed.2d 40 (1974). See 18 U.S.C. § 1153 (1976 ed.) (which provides for uniform penalties for both Indians and non-Indians charged with assault resulting in serious bodily injury). That issue is not before us, and we intimate no views on it.

12. Indeed, had respondents been prosecuted under state law, they may well have argued, under this Court's holding in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), that the state conviction was void for want of jurisdiction. In *Seymour*, an enrolled member of the Colville Indian Tribe was convicted in state court of attempted burglary within Indian country. In reversing the state conviction, this Court held:

"Since the burglary with which petitioner was charged occurred on property . . . within the . . . [Indian] reservation, the courts of Washington had no jurisdiction to try him for that offense." *Id.*, at 359, 82 S.Ct., at 429.

If state courts would have had no jurisdiction over respondents' case, then state law does not constitute a meaningful point of reference for establishing a claim of equal protection.

13. If we accepted respondents' contentions, persons charged with crimes on federal military bases or other federal enclaves could demand that their federal prosecutions be governed by state law to the extent that state law was more "lenient" than federal law. The Constitution does not authorize this kind of gamesmanship. Indeed, any such rule, even assuming its workability, is flatly inconsistent with the Supremacy Clause of the Constitution, Art. VI, cl. 2.

ther proceedings consistent with this opinion.

Reversed and remanded.

430 U.S. 651, 51 L.Ed.2d 711

James INGRAHAM, by his mother and next friend, Eloise Ingraham, et al., Petitioners,

v.

Willie J. WRIGHT, I, et al.

No. 75-6527.

Argued Nov. 2-3, 1976.

Decided April 19, 1977.

Florida junior high school students brought civil rights action alleging that they had been subjected to disciplinary corporal punishment in violation of their constitutional rights. The district court dismissed. The United States Court of Appeals for the Fifth Circuit, 498 F.2d 248, reversed, but, on rehearing en banc, 525 F.2d 909, affirmed. Certiorari was granted. The Supreme Court, Mr. Justice Powell, held that the cruel and unusual punishments clause of the Eighth Amendment did not apply to disciplinary corporal punishment in public schools; and that the due process clause did not require notice and hearing prior to the imposition of corporal punishment in the public schools, as that practice was authorized and limited by Florida's preservation of common-law constraints and remedies.

Affirmed.

Mr. Justice White filed a dissenting opinion in which Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Stevens joined.

Mr. Justice Stevens filed a dissenting opinion.

1. Criminal Law ⇐1213

Cruel and unusual punishments clause of Eighth Amendment did not apply to paddling of children as means of maintaining discipline in public schools. U.S.C.A. Const. Amend. 8.

2. Criminal Law ⇐1213

Cruel and unusual punishments clause of Eighth Amendment was designed to protect those convicted of crime and circumscribes criminal process in three ways: it limits kinds of punishment that can be imposed on those convicted of crimes, it proscribes punishment grossly disproportionate to severity of crime, and it imposes substantive limits on what can be made criminal and punished as such. U.S.C.A.Const. Amend. 8.

3. Constitutional Law ⇐252.5

Due process is required only when decision of state implicates interest within protection of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐254.1

Freedom from bodily restraint and punishment is within liberty interest in personal security that is protected from state deprivation without due process of law. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐278.5(6)

"Liberty," within meaning of Fourteenth Amendment is implicated where public school authorities, acting under color of state law, deliberately punish child for misconduct by restraint and infliction of appreciable physical pain. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

6. Constitutional Law ⇐278.5(7)

Due process clause did not require notice and hearing prior to imposition of corporal punishment in public schools, as that practice is authorized and limited by common law. U.S.C.A.Const. Amend. 14.

the car.[3] This is, quite simply, a case where no exigent circumstances existed.[4]

Until today it has been clear that "[n]either *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." Chambers v. Maroney, 399 U.S. 42, 50, 90 S.Ct. 1975, 1980, 26 L.Ed.2d 419. I would follow the settled constitutional law established in our decisions and affirm the judgment of the Court of Appeals.

417 U.S. 535, 41 L.Ed.2d 290

Rogers C. B. MORTON, Secretary of the Interior, et al., Appellants,

v.

C. R. MANCARI et al.

AMERIND, Appellant,

v.

C. R. MANCARI et al.

Nos. 73-362, 73-364.

Argued April 24, 1974.

Decided June 17, 1974.

Non-Indian employees of the Bureau of Indian Affairs brought class action challenging employment preference for qualified Indians in the Bureau provided by the Indian Reorganization Act. The three-judge United States District Court for the District of New Mexico, 359 F.Supp. 585 rendered judgment in favor of the plaintiffs and appeals were taken. The Supreme Court, Mr. Justice Blackmun, held that the employment preference for Indians in the Bureau of Indian Affairs was not impliedly repealed by the Equal Employment Opportunities Act of 1972, and that the preference did not constitute invidious racial discrimination but was reasonable and rationally designed to further Indian self-government.

Reversed and remanded.

1. Indians ⇐4

Employment preference for qualified Indians in the Bureau of Indian Affairs provided by the Indian Reorganization Act was not impliedly repealed by the Equal Employment Opportunities Act of 1972. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472; Equal Employment Opportunity Act of 1972, § 717(a), 42 U.S.C.A. § 2000e-16(a); Education Amendments of 1972, §§ 532, 810(a, d), 20 U.S.C.A. §§ 1119a, 887c(a, d); Executive Order No. 10577, 5 U.S.C.A. § 631 note.

2. Statutes ⇐158

Repeals by implication are not favored.

3. Statutes ⇐159

In absence of affirmative showing of an intention to repeal, only permissible justification for repeal by implication is when earlier and later statutes are irreconcilable.

3. It can hardly be argued that the questioning of the respondent by the police for the first time alerted him to their intentions, thus suddenly providing him a motivation to remove the car from "official grasp." *Ante*, at 2469, 2471. Even putting to one side the question of how the respondent could have acted to destroy any evidence while he was in police custody, the fact is that he was fully aware of official suspicion during several months preceding the interrogation. He had been questioned on several occasions prior to his arrest, and he had been alerted on the day before the interrogation that the police wished to see him. Nonetheless, he voluntarily drove his car to Columbus to keep his appointment with the investigators.

4. The plurality opinion correctly rejects, *ante*, at 2470, n. 7, the petitioner's contention that the seizure here was incident to the arrest of the respondent. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777.

4. **Statutes** ⇐223.4

Where there is no clear intention otherwise, specific statute will not be controlled or nullified by a general one, regardless of priority of enactment.

5. **Statutes** ⇐223.1

When two statutes are capable of coexistence, it is the duty of courts to regard each as effective absent a clearly expressed congressional intention to the contrary.

6. **Constitutional Law** ⇐254
Indians ⇐4

Employment preference for qualified Indians in the Bureau of Indian Affairs provided by the Indian Reorganization Act did not constitute indivious racial discrimination in violation of due process; preference was reasonable and rationally designed to further Indian self-government. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472; U.S.C.A. Const. art. 1, § 3, cl. 3, § 8, cl. 3; art. 2, § 2, cl. 2; Amend. 5.

7. **Indians** ⇐6

Statutes providing special treatment for Indians will not be disturbed so long as such treatment can be tied rationally to the fulfillment of Congress' unique obligation towards Indians. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472; 25 U.S.C.A. §§ 44–47, 274; U.S.C.A.Const. art. 1, § 3, cl. 3, § 8, cl. 3; art. 2, § 2, cl. 2; Amend. 5.

Syllabus *

Appellees, non-Indian employees of the Bureau of Indian Affairs (BIA), brought this class action claiming that the employment preference for qualified Indians in the BIA provided by the Indian Reorganization Act of 1934 contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, and deprived them of property rights without due process of law in violation of the Fifth Amendment. A three-judge District Court held that the Indian preference was implicitly repealed by § 11 of the 1972 Act proscribing racial discrimination in most federal employment, and enjoined appellant federal officials from implementing any Indian employment preference policy in the BIA. *Held:*

1. Congress did not intend to repeal the Indian preference, and the District Court erred in holding that it was repealed by the 1972 Act. Pp. 2480–2483.

(a) Since in extending general anti-discrimination machinery to federal employment in 1972, Congress in no way modified and thus reaffirmed the preferences accorded Indians by §§ 701(b) and 703(i) of Title VII of the Civil Rights Act of 1964 for employment by Indian tribes or by private industries located on or near Indian reservations, it would be anomalous to conclude that Congress intended to eliminate the long-standing Indian preferences in BIA employment, as being racially discriminatory. P. 2481.

(b) In view of the fact that shortly after it passed the 1972 Act Congress enacted *new* Indian preference laws as part of the Education Amendments of 1972, giving Indians preference in Government programs for training teachers of Indian children, it is improbable that the same Congress condemned the BIA preference as racially discriminatory. Pp. 2481–2482.

(c) The 1972 extension of the Civil Rights Act to Government employment being largely just a codification of prior anti-discrimination Executive Orders, with respect to which Indian preferences had long been treated as exceptions, there is no reason to presume that Congress affirmatively intended to erase such preferences. P. 2482.

(d) This is a prototypical case where an adjudication of repeal by implication is not appropriate, since the Indian pref-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

erence is a longstanding, important component of the Government's Indian program, whereas the 1972 anti-discrimination provisions, being aimed at alleviating minority discrimination in employment, are designed to deal with an entirely different problem. The two statutes, thus not being irreconcilable, are capable of co-existence, since the Indian preference, as a specific statute applying to a specific situation, is not controlled or nullified by the general provisions of the 1972 Act. Pp. 2482–2483.

2. The Indian preference does not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment but is reasonable and rationally designed to further Indian self-government. Pp. 2483–2485.

(a) If Indian preference laws, which were derived from historical relationships and are explicitly designed to help only Indians, were deemed invidious racial discrimination, 25 U.S.C. in its entirety would be effectively erased and the Government's commitment to Indians would be jeopardized. Pp. 2483–2484.

(b) The Indian preference does not constitute "racial discrimination" or even "racial" preference, but is rather an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. P. 2484.

(c) As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed. Pp. 2484–2485.

359 F.Supp. 585, reversed and remanded.

Harry R. Sachse, New Orleans, La., for appellants in No. 73-362.

Harris D. Sherman, Denver, Colo., for appellant in No. 73-364.

Gene E. Franchini, Albuquerque, N. M., for appellees.

Mr. Justice BLACKMUN delivered the opinion of the Court.

The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. § 461 et seq., accords an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA or Bureau). Appellees, non-Indian BAI employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e et seq. (1970 ed., Supp. II), and as violative of the Due Process Clause of the Fifth Amendment. A three-judge Federal District Court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. 359 F.Supp. 585 (NM 1973). We noted probable jurisdiction in order to examine the statutory and constitutional validity of this longstanding Indian preference. 414 U.S. 1142, 94 S.Ct. 893, 39 L.Ed.2d 99 (1974); 415 U.S. 946, 94 S.Ct. 1467, 39 L.Ed.2d 562 (1974).

I

Section 12 of the Indian Reorganization Act, 48 Stat. 986, 25 U.S.C. § 472, provides:

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office,[1] in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."[2]

1. The Indian Health Service was transferred in 1954 from the Department of the Interior to the Department of Health, Education and Welfare. Act of Aug. 5, 1954, § 1, 68 Stat. 674, 42 U.S.C. § 2001. Presumably, despite this transfer, the reference in § 12 to the "Indian Office" has continuing application to the Indian Health Service. See 5 CFR § 213.3116(b)(8).

2. There are earlier and more narrowly drawn Indian preference statutes. 25 U.S.C. §§ 44, 45, 46, 47, and 274. For all practical purposes, these were replaced by the broader

In June 1972, pursuant to this provision, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a directive (Personnel Management Letter No. 72-12) (App. 52) stating that the BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.[3] The record indicates that this policy was implemented immediately.

[1539] Shortly thereafter, appellees, who are non-Indian employees of the BIA at Albuquerque,[4] instituted this class action, on behalf of themselves and other non-Indian employees similarly situated, in the United States District Court for the District of New Mexico, claiming that the "so-called 'Indian Preference Statutes,'" App. 15, were repealed by the 1972 Equal Employment Opportunity Act and deprived them of rights to property without due process of law, in violation of the Fifth Amendment.[5] Named as defendants were the Secretary of the Interior, the Commissioner of Indian Affairs, and the BIA Directors for the Albuquerque and Navajo Area Offices. Appellees claimed that implementation and enforcement of the new preference policy "placed and will continue to place [appellees] at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the [appellees] to discrimination and deny them equal employment opportunity." App. 16.

A three-judge court was convened [1540] pursuant to 28 U.S.C. § 2282 because the complaint sought to enjoin, as unconstitutional, the enforcement of a federal statute. Appellant Amerind, a nonprofit organization representing Indian employees of the BIA, moved to intervene in support of the preference; this motion was granted by the District Court and Amerind thereafter participated at all stages of the litigation.

After a short trial focusing primarily on how the new policy, in fact, has been implemented, the District Court concluded that the Indian preference was implicitly repealed by § 11 of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 111, 42 U.S.C. § 2000e-16(a) (1970 ed., Supp. II), proscribing discrimination in most federal employment on the basis of race.[6] Hav-

preference of § 12. Although not directly challenged in this litigation, these statutes, under the District Court's decision, clearly would be invalidated.

3. The directive stated:
"The Secretary of the Interior announced today [June 26, 1972] he has approved the Bureau's policy to extend Indian Preference to training and to filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy." App. 52-53.

4. The appellees state that none of them is employed on or near an Indian reservation. Brief for Appellees 8. The District Court described the appellees as "teachers . . . or programmers, or in computer work." 359 F.Supp. 585, 587 (NM 1973).

5. The specific question whether § 12 of the 1934 Act authorizes a preference in promotion as well as in initial hiring was not decided by the District Court and is not now before us. We express no opinion on this issue. See Freeman v. Morton, 162 U.S.App. D.C. 358, 499 F.2d 494 (1974). See also Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (CA10 1970), cert. denied, 401 U.S. 981, 91 S.Ct. 1195, 28 L.Ed.2d 333 (1971) (preference held inapplicable to reduction in force).

6. Section 2000e-16(a) reads:
"All personnel actions affecting employees or applicants for employment (except with

ing found that Congress repealed the preference, it was unnecessary for the District Court to pass on its constitutionality. The court permanently enjoined appellants "from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian." The execution and enforcement of the judgment of the District
541 Court was stayed by Mr. Justice Marshall on August 16, 1973, pending the disposition of this appeal.

II

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834.[7] Since that time, Congress repeatedly has enacted various preferences of the general type here at issue.[8] The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government;[9] to further the Government's trust obligation toward the Indian tribes;[10] and 550
to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.[11]

The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machin-

regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

7. Act of June 30, 1834, § 9, 4 Stat. 737, 25 U.S.C. § 45:
"[I]n all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties."

8. Act of May 17, 1882, § 6, 22 Stat. 88, and Act of July 4, 1884, § 6, 23 Stat. 97, 25 U.S.C. § 46 (employment of clerical, mechanical, and other help on reservations and about agencies); Act of Aug. 15, 1894, § 10, 28 Stat. 313, 25 U.S.C. § 44 (employment of herders, teamsters, and laborers, "and where practicable in all other employments" in the Indian service); Act of June 7, 1897, § 1, 30 Stat. 83, 25 U.S.C. § 274 (employment as matrons, farmers, and industrial teachers in Indian schools); Act of June 25, 1910, § 23, 36 Stat. 861, 25 U.S.C. § 47 (general preference as to Indian labor and products of Indian industry).

9. Senator Wheeler, cosponsor of the 1934 Act, explained the need for a preference as follows:
"We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States, because these Indians own this property. It belongs to them. What the policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned . . . ." Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934).

10. A letter, contained in the House Report to the 1934 Act, from President F. D. Roosevelt to Congressman Howard states:
"We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection." H.R.Rep. No.1804, 73d Cong., 2d Sess., 8 (1934).

11. "If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men." H.R.Rep.No.474, 23d Cong., 1st Sess., 98 (1834) (letter dated Feb. 10, 1834, from Indian Commissioners to the Secretary of War).

ery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.[12] Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. Initial congressional proposals would have diminished substantially the role of the BIA by turning over to federally chartered self-governing Indian communities many of the functions normally performed by the Bureau.[13] Committee sentiment, however, ran against such a radical change in the role of the BIA.[14] The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.

One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations.[15] In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements was necessary.[16] Congressman Howard, the House sponsor, expressed the need for the preference:

"The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants. . . . The various services on the Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so." 78 Cong. Rec. 11729 (1934).

12. As explained by John Collier, Commissioner of Indian Affairs:
"[T]his bill is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affiars." Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 26 (1934).

13. Hearings on H.R. 7902, Readjustment of Indian Affairs, 73d Cong., 2d Sess., 1-7 (1934) (hereafter House Hearings). See also Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 152-153, n. 9, 93 S.Ct. 1267, 1272-1273, 36 L.Ed.2d 114 (1973).

14. House Hearings 491-497.

15. "[Section 12] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian" (footnote omitted). Mescalero Apache Tribe v. Hickel, 432 F.2d, at 960 (footnote omitted).

16. The bill admits qualified Indians to the position [*sic*] in their own service.
"Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.
"The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs." House Hearings 19 (memorandum dated Feb. 19, 1934, submitted by Commissioner Collier to the Senate and House Committees on Indian Affairs).

Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians.[17] Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the
1545 entire program for self-government.[18] Since 1934, the BIA has implemented the preference with a fair degree of success. The percentage of Indians employed in the Bureau rose from 34% in 1934 to 57% in 1972. This reversed the former downward trend, see n. 16, *supra*, and was due, clearly, to the presence of the 1934 Act. The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent. See Freeman v. Morton, 162 U.S.App.D.C. 358, 499 F.2d 494 (1974), and n. 5, *supra*.

III

It is against this background that we encounter the first issue in the present case: whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major piece of federal legislation prohibiting discrimination in *private* employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). Significantly, §§ 701(b) and 703(i) of that Act explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. 42 U.S.C. §§ 2000e(b) and 2000e–2(i).[19] This exemption reveals a clear congressional recognition, within the framework of Title VII, of the unique legal status of
1546 tribal and reservation-based activities. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:

> "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong.Rec. 12723 (1964).[20]

The 1964 Act did not specifically outlaw employment discrimination by the Federal Government.[21] Yet the mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective

17. Congressman Carter, an opponent of the bill, placed in the Congressional Record the following observation by Commissioner Collier at the Committee hearings:
"[W]e must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed." 78 Cong.Rec. 11737 (1934).

18. "It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians." *Id.*, at 11731 (remarks of Cong. Howard).

19. Section 701(b) excludes "an Indian Tribe" from the Act's definition of "employer." Section 703(i) states:
"Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

20. Senator Mundt supported these exemptions on the Senate floor by claiming that they would allow Indians "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (1964).

21. The 1964 Act, however, did contain a proviso, expressed in somewhat precatory language:
"That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin." 78 Stat. 254.
This statement of policy was re-enacted as 5 U.S.C. § 7151, 80 Stat. 523 (1966), and the 1964 Act's proviso was repealed, *id.*, at 662.

for the most part.[22] In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal employment. See n. 6, *supra*. In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government. As stated in the House Report:

> "To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly. . . . ." H.R.Rep. No. 92-238, on H.R. 1746, pp. 24-25 (1971).

Nowhere in the legislative history of the 1972 Act, however, is there any mention of Indian preference.

Appellees assert, and the District Court held, that since the 1972 Act proscribed racial discrimination in Government employment, the Act necessarily, albeit *sub silentio*, repealed the provision of the 1934 Act that called for the preference in the BIA of one racial group, Indians, over non-Indians:

> "When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed." Brief for Appellees 7.

[1] We disagree. For several reasons we conclude that Congress did not intend to repeal the Indian preference and that the District Court erred in holding that it was repealed.

First: There are the above-mentioned affirmative provisions in the 1964 Act excluding coverage of tribal employment and of preferential treatment by a business or enterprise on or near a reservation. 42 U.S.C. §§ 2000e(b) and 2000e-2(i). See n. 19, *supra*. These 1964 exemptions as to private employment indicate Congress' recognition of the long-standing federal policy of providing a unique legal status to Indians in matters concerning tribal or "on or near" reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

Second: Three months after Congress passed the 1972 amendments, it enacted two *new* Indian preference laws. These were part of the Education Amendments of 1972, 86 Stat. 235, 20 U.S.C. §§ 887c (a) and (d), and § 1119a (1970 ed.,

22. "This disproportionatte [*sic*] distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

> "A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. . . . ." H.R.Rep.No.92-238, on H.R. 1746, pp. 23-24 (1971).

Supp. II). The new laws explicitly require that Indians be given preference in Government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Third: Indian preferences, for many years, have been treated as exceptions to Executive Orders forbidding Government employment discrimination.[23] The 1972 extension of the Civil Rights Act to Government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had co-existed with broad anti-discrimination provisions in Executive Orders.

[2] Fourth: Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936); Wood v. United States, 16 Pet. 342–343, 363, 10 L.Ed. 987 (1842); Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334 (1968). They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary.

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

[3] In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456–457, 65 S.Ct. 716, 725–726, 89 L.Ed. 1051 (1945). Clearly, this is not the case here. A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique

23. See, *e. g.*, Exec.Order No. 7423, July 26, 1936, 1 Fed.Reg. 885–886, 3 CFR 189 (1936–1938 Comp.). When President Eisenhower issued an Order prohibiting discrimination on the basis of race in the civil service, Exec. Order No. 10577, § 4.2, Nov. 22, 1954, 19 Fed.Reg. 7521, 3 CFR 218 (1957–1958 Comp.), he left standing earlier Executive Orders containing exceptions for the Indian service. *Id.*, § 301. See also 5 CFR § 213.3112(a)(7), which provides a civil service exemption for:

"All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood."

See also 5 CFR § 213.3116(b)(8) (Indian Health Services).

legal relationship between the Federal Government and tribal Indians.

[4] Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by [551] a general one, regardless of the priority of enactment. See, *e. g.*, Bulova Watch Co. v. United States, 365 U.S. 753, 758, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961); Rodgers v. United States, 185 U.S. 83, 87–89, 22 S.Ct. 582, 583–584, 46 L.Ed. 816 (1902).

[5] The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.

We therefore hold that the District Court erred in ruling that the Indian preference was repealed by the 1972 Act.

IV

We still must decide whether, as the appellees contend, the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The District Court, while pretermitting this issue, said: "[W]e could well hold that the statute must fail on constitutional grounds." 359 F.Supp., at 591.

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. [552] Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

> "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to peform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . ." Board of County Comm'rs v. Seber, 318 U.S. 705, 715, 63 S.Ct. 920, 926, 87 L.Ed. 1094 (1943).

See also United States v. Kagama, 118 U.S. 375, 383–384, 6 S.Ct. 1109, 1113–1114, 30 L.Ed. 228 (1886).

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical rela-

tionships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. 1553 See Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 n. 13 (ED Wash.1965), aff'd, 384 U.S. 209, 86 S.Ct. 1459, 16 L. Ed.2d 480 (1966).

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. As discussed above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that institutional changes were required. An important part of the Inidan Reorganization Act was the preference provision here at issue.

[6] Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" 1554 preference.[24] Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. See n. 24, *supra*. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.[25] Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is

24. The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature. The eligibility criteria appear in 44 BIAM 335, 3.1:

".1 Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.

"This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment." App. 92.

25. Senator Wheeler described the BIA as "an entirely different service from anything else in the United States." Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934).

the principal characteristic that generally is absent from proscribed forms of racial discrimination.

[7] On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular [555] and special treatment. See, *e. g.*, Board of County Comm'rs v. Seber, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (federally granted tax immunity); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (same); Simmons v. Eagle Seelatsee, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966), aff'g 244 F.Supp. 808 (ED Wash.1965) (statutory definition of tribal membership, with resulting interest in trust estate); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974) (federal welfare benefits for Indians "on or near" reservations). This unique legal status is of long standing, see Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831); Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483 (1832), and its sources are diverse. See generally U. S. Dept. of Interior, Federal Indian Law (1958); Comment, The Indian Battle for Self-Determination, 58 Calif.L. Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

The judgment of the District Court is reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

417 U.S. 484, 41 L.Ed.2d 256

Dwight GEDULDIG, etc., Appellant,

v.

Carolyn AIELLO et al.

No. 73-640.

Argued March 26, 1974.

Decided June 17, 1974.

Action was brought to challenge California's disability insurance program which exempted from coverage any work loss resulting from pregnancy. A three-judge District Court, Zirpoli, J., 359 F.Supp. 792, found the program denied equal protection and state appealed. The Supreme Court, Mr. Justice Stewart, held that case was moot as to those persons who were entitled to benefits by virtue of program director's acquiescence in state decision limiting pregnancy exclusion to normal pregnancy, and that denial of benefits for work loss resulting from normal pregnancy did not violate the equal protection clause.

Reversed.

Mr. Justice Brennan filed dissenting opinion in which Mr. Justice Douglas and Mr. Justice Marshall joined.

1. Constitutional Law ⇐46(1)

Where administrator of state disability insurance program acquiesced in state court decision which limited program's exclusion of benefits for disability resulting from pregnancy to normal pregnancies, issue of validity of pregnancy exclusion was moot as to persons who had abnormal pregnancies and were therefore entitled to benefits. West's Ann.Cal.Unempl.Ins.Code, § 2626.

2. Constitutional Law ⇐224
Social Security and Public Welfare ⇐242

State disability insurance program provision excluding benefits for disability resulting from normal pregnancy did not violate equal protection clause. West's Ann.Cal.Unempl.Ins.Code, § 2626; U.S.C.A.Const. Amend. 14.

Erwin A. LaROSE and Jimmy Lee Swaggart, Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION.

No. 72-2069.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 18, 1973.

Decided March 26, 1974.

Receiver, as involuntary assignee of corporate bankrupt's license to operate a radio station, appealed from decision of Federal Communications Commission denying renewal of license and refusing, on ground of administrative finality, to entertain petition for reconsideration accompanied by a new proposal of sale. The Court of Appeals, McGowan, Circuit Judge, held that refusal of Federal Communications Commission to consider merits of second proposed sale and assignment of corporate bankrupt's broadcast license offered by court-appointed receiver within weeks of its refusal to renew license on ground of misconduct of bankrupt's principals constituted an abuse of discretion in that it operated to frustrate public interests recognized in "Second Thursday" doctrine by effectively depriving creditors of any significant recovery of moneys they had advanced.

Reversed and remanded with directions.

Telecommunications ⇐402

Refusal of Federal Communications Commission to consider merits of second proposed sale and assignment of corporate bankrupt's broadcast license offered by court-appointed receiver within weeks of its refusal to renew license on ground of misconduct of bankrupt's principals constituted an abuse of discretion in that it operated to frustrate public interests recognized in "Second Thursday" doctrine by effectively depriving creditors of any significant recovery of moneys they had advanced. Communications Act of 1934, § 310(b), 47 U.S.C.A. § 310(b).

Lauren A. Colby, Washington, D. C., for appellants.

Philip Permut, Counsel, F. C. C., with whom John W. Pettit, Gen. Counsel, and Joseph A. Marino, Associate Gen. Counsel, F. C. C., were on the brief, for appellee.

Before McGOWAN, ROBINSON and MacKINNON, Circuit Judges.

McGOWAN, Circuit Judge:

Appellant LaRose, having been designated by a federal court as receiver in bankruptcy of the assets of a corporation, and, as such, having been recognized by the Federal Communications Commission as the involuntary assignee of that corporation's license to operate a radio station, sought in due course to sell and assign the license for the benefit of the bankrupt estate. His initial attempt was rebuffed by the Commission on the ground that the transfer would have violated the Commission's so-called *Second Thursday* principle. The Commission then denied renewal of the license, and thereafter refused, on the ground of administrative finality, to entertain a petition for reconsideration accompanied by a new proposal of sale. We think that, in the circumstances of this case, the Commission has misapplied the finality doctrine.

I

The question before this court is whether the Commission abused its discretion in refusing to reopen its proceedings to consider the renewal of the license and its simultaneous sale and assignment to appellant Swaggart. Since resolution of this question depends so heavily on the facts, a detailed review of the entire history of the case is indicated.

Capital City Communications, Inc., the previous licensee of radio station

WLUX, obtained its license through an FCC approved assignment from KCIL, Inc. It now appears that some of the representations made by Capital in gaining Commission approval of that transfer may have been misleading, and that Capital thereafter may have operated the station in repeated violation of Commission rules. Thus, when time for renewal of the Capital license arrived, the Commission designated the Capital renewal application for a hearing on issues involving alleged violations of FCC rules and regulations. Order and Notice of Apparent Liability, F.C.C. 7-1140 (Oct. 27, 1970).

Some four months thereafter, KCIL, a substantial creditor of Capital, filed a petition to have Capital adjudicated a bankrupt, which was allowed in March of 1971. Appellant LaRose was subsequently appointed receiver of the assets and authorized by the referee in bankruptcy to operate the station until LaRose could arrange for its disposition. LaRose then sought and obtained from the Commission approval of the involuntary assignment to him of the WLUX license, and was substituted for Capital City in the pending license renewal proceedings.

LaRose negotiated the sale of the Capital assets and license to United Broadcast Industries, Inc. The proceeds from the purchase price of $250,000.00 were calculated to support the administrative expenses of the bankruptcy as well as to provide a 97.51% recovery of all creditors' claims. LaRose obtained approval of the referee in bankruptcy and thereafter petitioned the Commission for termination of the Capital license renewal proceedings and for approval of the sale and assignment of the WLUX license to United. In support of these requests, LaRose asserted that the proposed sale would comply with the FCC *Second Thursday* doctrine governing a receiver's disposition of the license of a station whose predecessor licensee stood accused of wrongdoing.[1] Additionally, LaRose maintained that the issues scheduled for hearing in the original renewal proceeding were effectively mooted by the adjudication of bankruptcy, his designation as receiver and licensee, and the negotiation of a sale and assignment of the WLUX license to a candidate who would operate the station in the public interest.

In February of 1972, the FCC denied both LaRose's request for termination of the original renewal proceedings and for assignment of the license to United, finding that the proposed sale failed to satisfy the *Second Thursday* doctrine requirement that the benefits to be received from it by persons charged with wrongdoing in the operation of the bankrupt station be outweighed by the public interest in protecting innocent creditors. Capital City Communications, Inc., 33 F.C.C.2d 703 (1972). After denying appellant LaRose's petition for reconsideration of those rulings, 34 F.C.C. 2d 685 (1972), the Commission proceeded to a consideration of renewal of the Capital license and, based on the misconduct of the principals of Capital, refused to renew the WLUX license to LaRose. 37 F.C.C.2d 164 (1972).[2]

1. Second Thursday Corp., 22 FCC 2d 515 (1970), 25 FCC 2d 112 (1970).

2. Assigning a license to a receiver in bankruptcy; and thereafter refusing to renew that license solely on the basis of the previous misconduct of the involuntary assignor, presents some logical difficulties. In the normal case the receiver will in no way be associated with the previous misdeeds of the bankrupt involuntary assignor. And, if the renewal issue is framed in terms of the assignor's misdoings, the receiver will not be ideally situated to gather adequate information to attempt to prove the case for license renewal. Thus, the manner in which the agency has framed the issue virtually assures that it will receive only very limited adversarial development of the underlying facts.

More importantly, this treatment of the license renewal question does little to accommodate the Commission's mandate to regulate in the public interest. This mandate is as broad as it is difficult to define. *See generally* Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923, 91 S.Ct.

Shortly thereafter, LaRose petitioned for reconsideration of the non-renewal of the WLUX license and offered to the Commission a second proposal for sale and assignment, which he asserted would offer no possibility of benefiting the miscreant owners of Capital City. The Commission refused to consider these petitions, however, determining that the public interest embodied in the doctrine of administrative finality precluded considering LaRose's proposal of a second sale after his failure on the first. Appellant LaRose and appellant Swaggart, the proposed purchaser in the second transaction, appeal.[3]

II

The Commission has gradually evolved a special policy for the disposition of a license held by a trustee in bankruptcy. In the normal non-bankruptcy situation, the Commission will not approve any assignment of a license until the existing authorization is renewed. Thus, if the assignor's qualifications are insufficient to enable him to renew his license, the Commission will not authorize assign-

2229, 2233, 29 L.Ed.2d 701 (1971); Radio Relay Corp. v. FCC, 409 F.2d 322 (2 Cir. 1969). Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest. For example, the Supreme Court recently held that the Federal Power Commission should consider the anticompetitive effect of the issuance of a security in determining whether that issuance would be compatible with the public interest. Gulf States Utilities v. FPC, 411 U.S. 747, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973). *See also* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom., Consolidated Edison of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966). While such decisions cannot be automatically transported from one administrative agency to the next, City of Lafayette v. SEC, 147 U.S.App.D.C. 98, 454 F.2d 941, 948 (1971), aff'd sub nom., *Gulf States Utilities, supra*, they do indicate that agencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.

While the Commission's *Second Thursday* doctrine for judging proposed assignments accommodates the policies of federal bankruptcy law with those of the Communications Act, the manner of its disposition of the license renewal issue in this case suggests that the FCC has not yet reconciled the two bodies of law in dealing with this aspect of the problem. In the case in which the license has been involuntarily assigned to a receiver in bankruptcy, the conduct of the previous licensee is of only indirect relevance to the renewal issue. As in the case of the *Second Thursday* doctrine itself, the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest. However, as in *Second Thursday*, that question should be considered in light of the public interest in the protection of innocent creditors. The broad question, therefore, would seem to be whether the public interest would best be served by permitting the receiver to continue to operate the station for a limited time in order to enable him to dispose of the asset. Like most FCC license determinations, this question would require evaluation of a number of factors, *e. g.*, the receiver's ability temporarily to operate the station successfully; the existence of other parties who seek construction permits for the same or overlapping frequencies and the relative merits of their applications; and the likelihood of the receiver's disposition of the license within a reasonable time. While the establishment of policies that would accommodate these diverse interests is by no means an easy task, it would seem to be an endeavor that would be more in keeping with the overall agency responsibility than is the FCC's present course.

Our disposition of this appeal makes it unnecessary for us to rule on this question definitively. As the Commission on reconsideration will immediately be presented with a proposed sale and assignment, it is possible that no question will arise concerning appellant LaRose's qualifications to serve as a temporary licensee.

3. Appellants challenge the Commission's decision not to renew the WLUX license and its refusal to reconsider that nonrenewal and to examine the proposed sale by LaRose to Swaggart. 37 F.C.C.2d 164 (1972) and 38 F.C.C.2d 1010 (1972). The Commission's previous determination that the first proposed sale violated the FCC *Second Thursday* doctrine, 33 F.C.C.2d 703, reconsideration denied, 34 F.C.C.2d 685 (1972), is not in issue here.